

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Sep 17, 2021

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MICHELE D.,

Plaintiff,

v.

KILOLO KIJAKAZI, Acting
Commissioner of Social Security
Administration,

Defendant.

No. 1:20-cv-03145-SMJ

ORDER REMANDING CASE

Before the Court, without oral argument, are Plaintiff's Motion for Summary Judgment, ECF No. 23, and Defendant's Motion to Remand, ECF No. 25. The parties agree that the ALJ erred by improperly evaluating the medical opinion evidence, improperly rejecting Plaintiff's opinion evidence, and improperly rejecting lay witness testimony. *See* ECF No. 23 at 2; ECF No. 25 at 3. But they disagree about the appropriate remedy. *Compare* ECF No. 26 *with* ECF No. 28. Plaintiff asks this Court to either remand for an award of benefits or with instructions for a *de novo* hearing, ECF No. 26 at 2, while Defendant asks the Court to remand without the mandatory instruction of either a *de novo* hearing or award of benefits, ECF No. 28 at 4. Having reviewed the motions and the file in this matter,

1 the Court is fully informed and remands this matter under Defendant’s requested
2 conditions. The Court thus reverses and remands the matter for further
3 administrative proceedings before an Administrative Law Judge (ALJ) and a new
4 decision regarding Plaintiff’s applications for benefits under the Social Security
5 Act.

6 **PROCEDURAL HISTORY¹**

7 Plaintiff filed for disability in 2013. AR 171. In 2015, an ALJ issued an
8 unfavorable decision. AR 16. Plaintiff appealed, and this Court remanded for
9 additional proceedings. AR 472. In 2020, the ALJ once again denied her claim, and
10 Plaintiff again appealed. AR 386–99; ECF No. 1.

11 **LEGAL STANDARD**

12 **A. Remand for Benefits**

13 “The decision whether to remand a case for additional evidence, or simply to
14 award benefits is within the discretion of the court.” *Sprague v. Bowen*, 812 F.2d
15 1226, 1232 (9th Cir. 1987). It is proper to remand for an immediate award of
16 benefits only when: “(1) the record has been fully developed and further
17 administrative proceedings would serve no useful purpose; (2) the ALJ has failed
18

19 ¹ The facts of the case are set forth in the administrative record and the parties’
20 briefs. *See, e.g.*, ECF No. 23 at 4–8. The parties have discussed any additional
relevant facts in their briefing. *See generally* ECF Nos. 23, 25, 27 & 28. The Court
thus provides only a short procedural summary here.

1 to provide legally sufficient reasons for rejecting evidence, whether claimant
2 testimony or medical opinion; and (3) if the improperly discredited evidence were
3 credited as true, the ALJ would be required to find the claimant disabled on
4 remand.” *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir. 2014). The Ninth Circuit
5 has “stated or implied that it would be an abuse of discretion for a district court not
6 to remand for an award of benefits” when these three conditions are met. *Id.* But
7 “[i]n rare instances, though each of the credit-as-true factors is met, the record as a
8 whole leaves serious doubt as to whether the claimant is actually disabled.” *Trevizo*
9 *v. Berryhill*, 871 F.3d 664, 683 n.11 (9th Cir. 2017).

10 In other words, a remand for award of benefits is appropriate only if the
11 record, taken as a whole, leaves “not the slightest uncertainty as to the outcome.”
12 *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1101 (9th Cir. 2014).

13 **B. *De Novo* Hearing**

14 The Social Security Act (“the Act”) requires that the “Commissioner shall
15 give such applicant and such other individual reasonable notice and opportunity for
16 a hearing.” 42 U.S.C. § 405(b)(1). However, the Act does not require that a claimant
17 receive a new hearing on remand. *See* 42 U.S.C. § 405(g) (“The court shall have
18 power to enter . . . a judgment . . . with or without remanding the cause for a
19 rehearing.”). Nor do the regulations require that an ALJ hold a new hearing in every
20 remand:

1 The Appeals Council may remand a case to an administrative law judge
2 so that he or she may hold a hearing and issue a decision or a
3 recommended decision. The Appeals Council may also remand a case
in which addition evidence is needed *or additional action by the
administrative law judge is required.*

4 20 C.F.R. § 404.977(a) (emphasis added); *see also* 20 C.F.R. § 404.983(e) (the
5 procedures outlined in Section 404.977 apply to cases remanded by federal courts).
6 Where a *de novo* hearing would not provide helpful insight on remand, one is not
7 required.

8 **DISABILITY DETERMINATION**

9 A “disability” is defined, for the purposes of receiving social security
10 benefits, as the “inability to engage in any substantial gainful activity by reason of
11 any medically determinable physical or mental impairment which can be expected
12 to result in death or which has lasted or can be expected to last for a continuous
13 period of not less than twelve months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A).
14 The ALJ uses a five-step sequential evaluation process to determine whether a
15 claimant qualifies for disability benefits. 20 C.F.R. §§ 404.1520, 416.920.

16 At step one, the ALJ considers the claimant’s work activity, if any. 20 C.F.R.
17 §§ 404.1520(a)(4)(i),(b), 416.920(a)(4)(i),(b). If the claimant is doing any
18 substantial gainful activity, the ALJ will find the claimant not disabled and deny
19 their claim. *Id.* If the claimant is not doing any substantial gainful activity, the
20 evaluation proceeds to step two.

1 At step two, the ALJ considers the medical severity of the claimant's
2 impairment(s). 20 C.F.R. §§ 404.1520(a)(4)(ii), (c), 416.920(a)(4)(ii), (c). If they
3 do not have a severe medically determinable physical or mental impairment that
4 meets the twelve-month duration requirement in Section 404.1509, or a
5 combination of impairments that is severe and meets the duration requirement, the
6 ALJ will find the claimant not disabled and deny their claim. *Id.* If the claimant
7 does have a severe physical or mental impairment, the evaluation proceeds to step
8 three.

9 At step three, the ALJ also considers the medical severity of the claimant's
10 impairment(s). 20 C.F.R. §§ 404.1520(a)(4)(iii), (d), 416.920(a)(4)(iii), (d). If they
11 have an impairment(s) that meets or equals one of the Social Security
12 Administration's listings in appendix 1 of this subpart and meets the duration
13 requirement, the ALJ will find the claimant disabled. *Id.*; 404 Subpt. P App. 1. If
14 their impairment(s) does not meet or equal a listed impairment, the evaluation
15 proceeds to step four.

16 At step four, the ALJ considers the claimant's residual functional capacity
17 and their past relevant work. 20 C.F.R. §§ 404.1520(a)(4)(iv), (e),
18 416.920(a)(4)(iv), (e). If they can still do their past relevant work, the ALJ will find
19 the claimant not disabled and deny their claim. *Id.*; *see also* §§ 416.920(f), (h),
20 416.960(b). If they cannot, the evaluation proceeds to step five.

1 At the fifth and final step, the ALJ considers the claimant's residual
2 functional capacity and their age, education, and work experience to see if they can
3 adjust to other work. 20 C.F.R. §§ 404.1520(a)(4)(v), (f), 416.920(a)(4)(v), (f). If
4 they can adjust to other work, the ALJ will find the claimant not disabled and deny
5 their claim. *Id.* If they cannot, the ALJ will find the claimant disabled and grant
6 their claim. *Id.*; *see also* §§ 404.1520(g), (h), 404.1560(c).

7 The burden shifts during this sequential disability analysis. The claimant has
8 the initial burden of establishing a prima facie case of entitlement to benefits.
9 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971). If the claimant makes such
10 a showing, the burden then shifts to Defendant to show work within the claimant's
11 capabilities. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984); *see also* SSR 13-
12 2P, 2013 WL 621536, at *4 ("The claimant has the burden of proving disability
13 throughout the sequential evaluation process. Our only burden is limited to
14 producing evidence that work the claimant can do exists in the national economy at
15 step 5 of the sequential evaluation process."). To find a claimant disabled, their
16 impairments must not only prevent them from doing their previous work, but also
17 (considering their age, education, and work experience) prevent them from doing
18 any other substantial gainful work that exists in the national economy. *Id.*; 42 U.S.C.
19 §§ 423(d)(2)(A), 1382c(a)(3)(B).

20 //

ALJ FINDINGS

The ALJ found that Plaintiff had last met the insured status requirements of the Social Security Act on March 31, 2018. AR 391. At step one, the ALJ found that Plaintiff had “not engaged in substantial gainful activity during the period from her alleged onset date of October 31, 2012 through her date last insured of March 31, 2018 [“the relevant period”].” *Id.*

At step two, the ALJ found that Plaintiff suffered from severe impairments during the relevant period, including: migraine headaches, obesity, cirrhosis of the liver, somatoform disorder, and anxiety disorder. *Id.*

At step three, the ALJ found that Plaintiff did “not have an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments” during the relevant period. AR 392.

At step four, the ALJ found that Plaintiff has no past relevant work during the relevant period. AR 397.

At step five, the ALJ found that, during the relevant period, Plaintiff had the residual functional capacity to perform light work, except she can never climb ladders, ropes, scaffolds, ramps, or stairs and can occasionally stoop and crouch. The ALJ found she can “perform unskilled repetitive routine tasks in two-hour increments; have no contact with the public; occasional contact with supervisors; and can work in proximity to but not in coordination with, coworkers.” AR 393.

1 Based on Plaintiff's age, education, work experience, and residual functional
2 capacity, the ALJ found that she could perform other work existing in significant
3 numbers in the national economy during the relevant period and thus was not
4 disabled. AR 397–99. The ALJ determined that Plaintiff could perform the
5 requirements of occupations such as mail clerk, marker, or food sorter. AR 398.

6 DISCUSSION

7 A. Remand for Benefits

8 The Court declines to reverse for an immediate award of benefits. The Court
9 cannot determine that remand would only delay an award to Plaintiff. *Cf. Lewin v.*
10 *Schweiker*, 654 F.2d 631, 635 (9th Cir. 1981). Although Plaintiff's evidence, when
11 credited, constitutes convincing evidence of disability, it is possible a reasonable
12 ALJ could find otherwise. *Treichler*, 775 F.3d at 1101. For example, Plaintiff held
13 herself out as being able to do *some* work during the relevant period. *See* AR 344
14 (asking Dr. Whittlesey, her treatment provider to sign doctor's note describing her
15 limitations so she could return to "some type of employment."); *see also* AR 190
16 (Plaintiff collected unemployment benefits during 2013). And Dr. Williams himself
17 noted that Plaintiff "did not appear particularly anxious." AR 336. This undermines
18 Plaintiff's contention that giving Dr. Williams's opinion great weight *necessitates*
19 a finding of disability. *See* ECF No. 26 at 5–8. There might be—and perhaps even
20 likely is—as Plaintiff claims, an explanation for these inconsistencies which causes

1 the ALJ to make a determination that Plaintiff was disabled. But the Court cannot
2 find that the record, taken as a whole, leaves “not the slightest uncertainty as to the
3 outcome.” *Treichler*, 775 F.3d at 1101; *see also Garrison*, 759 F.3d at 1020.

4 **B. *De Novo* Hearing**

5 The Court also declines to require a *de novo* hearing upon remand, leaving
6 that determination to the discretion of the ALJ, given the instructions below. The
7 relevant period ended on March 31, 2018. AR 391. There have been two hearings
8 since that time. ECF No. 28 at 2 (citing AR 1080–115 and AR 407–44). At the most
9 recent hearing, Plaintiff stated “she can’t remember hardly anything.” AR 424. A
10 reasonable ALJ could determine that a *de novo* hearing is not necessary and would
11 not provide new information or helpful insight.

12 Accordingly, **IT IS HEREBY ORDERED:**

13 1. Plaintiff’s Motion for Summary Judgment, **ECF No. 23**, is
14 **GRANTED IN PART** and **DENIED IN PART**.

15 2. Defendant’s Motion to Remand, **ECF No. 25**, is **GRANTED**.

16 3. The above-captioned case shall be **REVERSED** and **REMANDED**
17 for further administrative proceedings.

18 4. On remand, the ALJ shall:

19 A. Further evaluate the opinions of the record, especially those of
20 Dr. Williams, and provide rationale for the weight accorded;

B. Properly assess and weigh the opinion of consultative examiner,
R. Richard Sloop, M.D.;

C. Properly assess lay witness testimony;

D. Further evaluate Plaintiff's residual functional capacity;

E. If warranted, obtain evidence from a medical expert related to the nature and severity of and functional limitations resulting from Plaintiff's impairments;

F. If warranted, obtain supplemental evidence from a vocational expert to clarify the effect of the assessed limitations on Plaintiff's occupational base; and

G. If warranted, conduct a *de novo* hearing. *See* 42 U.S.C. § 405(b)(1), (g).

5. All hearings and deadlines are **STRICKEN**.

6. The Clerk's Office is directed to **ENTER JUDGMENT** for Plaintiff and **CLOSE** the file.

IT IS SO ORDERED. The Clerk's Office is directed to enter this Order and provide copies to all counsel.

DATED this 17th day of September 2021.

Juan Carlos Mendoza

SALVADOR MENDOZA, JR.
United States District Judge